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Judge: Calendar, 8

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

ROBERT GOLDBERG, DDS,	)	
	)	
Plaintiff,	)	Case No. 2019 L 005521
v.	)	
	)	Judge Mullen
MARY KATHERINE ALBERTI,	)	
	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIFTH AMENDED COMPLAINT

Defendant, Mary Katherine Alberti ("Alberti"), by and through her attorneys, submits her Reply in support of her Motion to Dismiss Plaintiff's Fifth Amended Complaint ("5AC").

INTRODUCTION

Defendant moved to dismiss Plaintiff's 5AC pursuant to 735 ILCS 5/2-615 and 2-619. Plaintiff's response does not, and cannot, cure the deficiencies in the 5AC. As a result, the 5AC should be dismissed, this time with prejudice given the numerous opportunities Plaintiff has had to attempt to state claims it has become obvious he cannot do so.

The 5AC represents Plaintiff's sixth retaliatory attempt to extort money from Defendant and manage his reputation by improperly using the legal system to remove online reviews he does not appreciate while seeking to punish Defendant for his admitted misconduct. In the 5AC, Plaintiff concedes to failing to protect the private health information of all his patients whom he mislead into believing were protected by HIPAA. While minimizing and denying his errors, Plaintiff instead casts blame onto Alberti – calling it "her violation" – and characterizes Alberti as belligerent, hostile, and aggressive for alerting him to them. Plaintiff utilizes his position of authority and trust as a self-purported "upstanding and accomplished endodontist" to evade the truth and try to hold Defendant accountable for a situation that he created and failed to mitigate.

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Holding a fiduciary responsibility, Plaintiff callously dismisses Defendant's legitimate safety concerns, expressions of hurt, and feelings of profound betrayal. He demonstrates actual or deliberate intention to harm or which, if not intentional, shows an utter indifference to or conscious disregard of a person's own safety and the safety of others. And rather than contacting his patient to provide a CBCT associated with a "root canal gone awry" referenced in online posts, Plaintiff admits to flagging, suppressing, and removing – allegedly 90 times – online reviews that he admits were *"reposted"* but only *"if"* removed. (5AC ¶92). When he could no longer remove reviews, Plaintiff came into this Court, claiming to be the victim of a cyber-attack for statements he knew were true and deemed nonactionable in February 2022 by the Court, but for which he expects to be compensated. Plaintiff further demands to "be allowed to proceed toward restoring his reputation and achieving just compensation" (Response 2) despite failing to clear things directly with Defendant while he was suppressing speech, threatening legal action, engaging in a smear campaign over her alleged violation and repeatedly coercing her to settle his claim.

The case has now been pending for over three years and Plaintiff still has not followed the Court's numerous directives as to what would be required to state valid claims. In July 2021 the Court admonished Plaintiff that his allegations failed to provide the requisite "clear and concise structure to the complaint that can be, number one, prosecuted but, secondly, defended." In February 2022, Plaintiff assured the Court that, given a final opportunity, he would provide a cohesive complaint and plead with specificity that would allow the Defendant to respond. Despite the time and voluminous filings, Defendant was forced to file another motion to dismiss that repeats the same arguments because Plaintiff' repeatedly failed to state a valid claim. Instead, Plaintiff submits jumbled allegations containing unverified, ever changing alleged verbal statements representing protected communications that he commingles with online posts infused

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with his interpretations of a story that Plaintiff, not Defendant, weaves. Plaintiff's 5AC introduces a hodge-podge of alleged verbal statements, in his repeated attempts to divert legal requirements disguised in the face of blatant chaos, confusion, and misdirection. The case must be dismissed, this time with prejudice, as Plaintiff has clearly shown that he cannot state valid claims. Nor is a court proceeding the place to repeatedly argue Plaintiff's perceptions. While purporting to be a victim of Defendant making statements primarily to her family, Plaintiff refuses to take accountability for his actions and persists in his vexatious attempts to profit from Defendant exercising her constitutional right to free speech.

ARGUMENT

A. Plaintiff Concedes Counts III, IV, V, and VI Should Be Dismissed

Plaintiff concedes that the Court has dismissed with prejudice Counts III (Breach of Contract – Third Party Beneficiary), IV (Fraud), V (Consumer Fraud), and VI (Tortious Interference with Prospective Business Relations), that these counts were pled in the 5AC solely for purposes of appeal. (Response at 1, n.1). As a result, these counts should again be dismissed.

B. Plaintiff Fails to State a Valid Defamation *Per Se* Claim (Counts IA, IB and IC)

Plaintiff failed to state a claim for defamation *per se*. In his response, Plaintiff relies heavily on *Green v. Rogers,* 234 Ill.2d 478 (2009). But that case supports Defendant's motion. In *Green*, the Illinois Supreme Court dismissed a plaintiff's defamation per se claims on grounds that the plaintiff failed to plead with precision and particularity the facts supporting her defamation claim, and that the alleged defamatory statements were opinions, as opposed to facts. Further, the court held the plaintiff made allegations on information and belief but failed to allege the requisite facts upon which such information and belief was based. Similarly, here Plaintiff's allegations lack the requisite precision. Further, Plaintiff makes numerous allegations on information and belief (5AC ¶14(E), 21, 50, 54, 55, 56, 58, 60, 61, 64, 65, 67, 78), but fails to allege any facts

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whatsoever as to the basis for those information and belief allegations. Thus, *Green* supports dismissal of these claims. Plaintiff asserts that "although some of the allegations in Count IA are pled on information and belief, or are paraphrased, those allegations nonetheless are proper" or "the 5thAC states either how plaintiff came to be so informed or what facts cause [him] to believe" the allegations." (Response at 4). However, Plaintiff makes no reference to the "how" and attributes all statements to Defendant's ninety-year old relative, who Plaintiff also threatened to sue.

1. Count IA Libel *Per Se*: Accusing Plaintiff of Committing Crimes

Defendant moved to dismiss this claim as it is substantially similar to the allegations in the 4AC that the Court found to be deficient. The 5AC does not allege any accusations of criminal conduct. Plaintiff argues that these alleged crimes included "a violation of HIPPA" and "conspired with other dentists to cover up the HIPPA violation, to boycott her as a patient." (Response at 2). But Plaintiff fails to allege that these are crimes. HIPAA is a civil statute, and Plaintiff does not allege there was any accusation of a criminal violation of HIPPA. As for online reviews, there are no statements containing or even implying such allegations. Indeed, Plaintiff alleges his HIPAA violation was merely an "an inadvertent, incidental disclosure." (5AC ¶57).

2. Count IB Libel *Per Se:* Accusing Plaintiff of Lack of Professional Ability and Incompetent and Unethical Treatment

Defendant moved to dismiss this claim as it is substantially similar to the allegations in the 4AC that the Court found to be deficient. The 5AC does not allege any actionable accusations of lack of professional ability or want of integrity. The accusations alleged are subject to either opinions or innocent construction, neither of which are actionable. "A statement 'reasonably' capable of a nondefamatory interpretation, given its verbal or literary context, should be so interpreted. There is no balancing of reasonable constructions." *Green*, 234 Ill.2d at 500. For

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example, Plaintiff alleges Defendant's alleged statement of "feeling unsafe in my own home" (5AC ¶65) is actionable, when such merely describes Defendant's personal subjective feeling. Knowing that the accusation that her statements about getting a root canal "went awry" is not actionable, Plaintiff points to other words used in the paragraph. But those other words do not negate the innocent construction suggested by Defendant. The actual words of the Yelp Review, read in their entirety, does not state that there was any negligence by Dr. Goldberg. In fact, the post clearly conveys the opposite: "I've managed many complex procedures and know there are inherent risks and potentially undesirable outcomes with any treatments", like maybe the weakening of a tooth. The reviewer does not assign blame or suggest incompetent dentistry. Procedures can and often fail. But Plaintiff assigns blame, and onto Defendant, waging accusations that "her behavior after treatment exacerbated the problems with her tooth." (5AC ¶22). This statement is subject to a reasonable innocent construction that the root canal "went awry" at some point after it was performed for reasons unattributable to Plaintiff's performance. While the poster may have expressed dissatisfaction with the way the matter was subsequently handled by Plaintiff's office and others, it does not necessarily accuse Plaintiff of malpractice or otherwise fall under a *per se* category. Plaintiff argues "[a]ll of Defendant's postings across a range of online review sites describe Dr. Goldberg as a highly unethical and incompetent dentist and therefore are actionable." (Response at 8). But those are Plaintiff's words, not Defendant's. Defendant writes that Plaintiff is a "talented endodontist with a seemingly brilliant career." She further notes that the review is not based on any professional expertise, "solely intended to share my experience and reflects my personal opinion, perceptions, and interpretations information" and "I'm not claiming that you'll have the same experience but felt the information should be shared, especially in an industry with little oversight and important to everyone's well-being." The

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allegations can be innocently construed, and those cannot support a defamation *per se* claim. Further, Plaintiff relies on alleged racist remarks to a patient, but those are not actionable as *per se* defamation.

C. Plaintiff Fails to State a Libel *Per Quod* Claim (Count IC)

Defendant moved to dismiss this claim as it failed to state a cause of action. Words libelous *per quod* are false but require an innuendo to give them a libelous meaning and require evidence to show that as a matter of fact some substantial injury has followed from their use. *Heerey v. Burke*, 188 Ill.App.3d 527, 532 (1st Dist. 1989). Loosely translated, *per quod* means "with explanation." *Id.* To survive dismissal, a plaintiff must plead the defamatory meaning of otherwise ambiguous words, and special damages. *Id.* That is, specific factual allegations of extrinsic facts, malice, and special damages must be alleged with particularity. *Id.* Plaintiff fails to meet any of these elements. Instead, Plaintiff concludes that he provides "more than enough facts to show how Defendant's statements were malicious." (Response at 10). But Plaintiff concluding he provided such facts does not constitute such facts, and Plaintiff cannot make up for the deficiencies in his pleading by making conclusory generalizations in his response.

Further, allegations of damages from the alleged libel cannot be speculative. *Chang Hyun Moon v. Kang Jun Liu*, 2015 IL App (1st) 143606, ¶16; *Maag v. Illinois Coalition for Jobs, Growth & Prosperity,* 368 Ill.App.3d 844, 853 (5th Dist. 2006). Plaintiff's allegations of damages in his 5AC are far too speculative to survive dismissal. Plaintiff argues that he "had to pay a service to monitor and attempt to remove the defamatory online postings and he has incurred attorney's fees and costs to send take-down letters to Google and Yelp." (Response at 10). But these allegations are not sufficient to allege compensatory damages. Illinois law follows the "American Rule," which holds that attorney's fees and other litigation expenses are not awarded to the successful litigant in the absence of an explicit statute or contractual agreement permitting such an award.

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Cedeno v. Pacelli, 192 N.Y.S.2d 533, 534 (2021) ("Plaintiffs allegations that….they have had to pay expenses to protect their reputation, including an online reputation management and monitoring company and attorneys are insufficient to plead the special damages element of trade libel"); *Ebert v. Thompson*, 282 Ill.App.3d 385 (1st Dist. 1996). Moreover, Plaintiff flagged, suppressed, and removed true reviews that were "reposted" only "if" they were removed, against website terms and in violation of consumer fraud laws. In the meantime, Plaintiff confoundingly alleges reviews were posted with different email addresses concluding that this has to make them false.

CONCLUSION

WHERFORE, Defendant, Mary Katherine Alberti, respectfully requests this Court dismiss Plaintiff's Fifth Amended Complaint with prejudice.

MARY KATHERINE ALBERTI

By /s/ James K. Borcia
One of Her Attorneys

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